

ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of Sections 3(n) and 332 )  
of the Communications Act )  
 )  
Regulatory Treatment of Mobile Services )

GN Docket No. 93-252

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To: The Commission

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

REPLY COMMENTS

Madera Radio Dispatch, Inc. (Madera) by and through counsel hereby opposes the proposal proffered by Nextel Communications, Inc. (Nextel) to the Commission within the context of this Rule Making. As a long standing operator of SMR facilities within the State of California and as a licensee of radio common carrier channels for the provision of two-way services to the public, Madera is well situated to make meaningful comment, including illuminating the dangerous precedent which grant of Nextel's proposal might create.

Its Own Victim

Nextel finds itself in its present position by the action of no one, except itself. If Nextel's complained of problems arise out of design of its equipment, Nextel should seek solutions from a competent equipment provider. If Nextel's difficulties arise out of the dynamics of the marketplace, those dynamics existed when Nextel earlier boasted its ability to create ESMR systems without the need to disturb the Commission's processes or frequency allocation plans. If Nextel's problems arise out of the existence

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of other, non-ESMR operators, its business plans should have accounted for this known factor when it first devised its business and operational strategy. In sum, if Nextel has become a victim, it can blame no one for its status other than its own Board of Directors.

Neither the Commission nor other affected operators should be placed in a position of attempting to insure Nextel's success or even the success of ESMR. SMR operators did not ask for the duty and the duty should not now be foisted upon them.

Nextel's actions to date have been nothing if not wholly self-serving. This is not intended as criticism, but rather as a statement of fact. That is the nature of business. However, the Commission must recognize that Nextel's latest demand for special treatment remains in this vein and creates no basis for forcing unwanted, costly cooperation on the majority of the industry.

Madera respectfully reminds the Commission of the informal signs which have appeared on the desks of its own employees, whose jobs it has been to review requests for Special Temporary Authority. Those signs have read, "Your failure to plan does not constitute an emergency for me." There is wisdom in the sentiment and the Commission would do well to heed that wisdom in this instance.

### Nextel's Faulty Premises

Nextel's position would attain greater credibility if it did not include contradictions, faulty premises and sweeping statements which are fully belied by the content of Nextel's own comments. For example,

Nextel claims that its technology is the most efficient use of the radio spectrum produced by a CMRS operator, see, Nextel Comments at pg. 8. Yet, within the same comments Nextel states that its systems are beleaguered with inefficiencies, interference problems, growth problems and a host of other ills. Madera cannot fathom how Nextel can sing the praises of its system and its technology with one breath and damn it with the next.

Nextel consistently demands parity with cellular systems and PCS systems, but fails to demonstrate how its demands are mirrored in previous or proposed actions taken or to be taken by cellular and PCS operators. Cellular operators did not propose a system which would be overlaid upon an existing market filled with fully operational systems, providing service to millions of the members of the public. Cellular and PCS proponents sought the allocation of new spectrum for the bringing forth of their services. If Nextel were sincere in its request, it would seek the identical advantages provided to cellular and PCS carriers, an allocation of new spectrum.<sup>1</sup> In this manner, Nextel would

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<sup>1</sup> It is far more logical for Nextel to await the reallocation of spectrum presently used by the federal government for its proposal of a separate allocation. In that manner, Nextel's proposal would not churn the use of spectrum, causing unjustified

not now be in a position whereby it insists that the Commission upset the legitimate operation of hundreds of SMR operators to accommodate the desires of the few.

Nextel's attempt to gain the unusual relief it has sought involves the disruption of existing businesses and the customers they serve. Its "retuning" of SMR transmitters and mobile units cannot be accomplished smoothly, will require down time for each system's conversion, and will undermine customers' confidence in their home systems. Accordingly, Nextel's characterization of the effect of its proposed "solution" is far from accurate and could result in devastating losses for traditional SMR operators. It is relevant to note that Nextel claims a scant 5,000 ESMR customers at this time, yet does not mention the millions of subscribers which would be injured by grant of its request. It appears that equity and the public interest are not served by Nextel's proposal.

Nextel's comments are fraught with references to the creation of parity among all CMRS operators. Yet, its proposal merely seeks consideration of the Commission's treatment of ESMR systems, ignoring all other CMRS operators, including paging concerns, IMTS operators, and other similarly situated CMRS operators. What would Nextel ask of the Commission to provide its elusive parity for those operators? Were the Commission to grant Nextel's unusual and potentially damaging request, it would create a dangerous precedent, causing other operators of other CMRS systems to demand parity with other SMRS services to which they are not, in fact, similar.

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chaos in the marketplace.

Finally, Nextel's characterization of the amount of time, resources and confusion to be exacted upon the Commission to accommodate a relatively small number of ESMR operators was not sufficiently explored in Nextel's comments. Nextel appears to be claiming that the Commission need do little more than change a record here and a license there and bingo, the job is done. This impression is hardly accurate as the Commission is well aware. The confusion of doing thousands of frequency swaps is mind boggling.

Unlike other Private Radio stations, each new authorization would need to be scrutinized for co-channel separation from other existing facilities, to determine whether the substitute frequency will, in fact, work within the environment, providing the mandated protection to other facilities. Short-space agreements will require ratification or may be impaired by swapping frequencies.<sup>2</sup> If two ESMR operators are located in the same market, the Commission would need to determine which has "swapping rights" in that market with each traditional SMR operator located therein; and the Commission would have to consider the effect of two ESMR operators swapping frequencies without coordination.

In sum, Nextel's proposal cannot be employed by the Commission without the use of an extreme amount of the Commission's resources. It must necessarily create chaos, confusion and waste. There exists no incentive for the Commission to take such radical

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<sup>2</sup> Short-spacing agreement are contracts, the obligations of which the Federal Government is constitutionally precluded from impairing.

steps to appease Nextel and to compensate Nextel for its failure to plan. Accordingly, Madera vigorously opposes Nextel's proposal.

#### Nextel's Proposal Misses The Mark

Within its comments at page 15, Nextel claims that grant of its proposal would solve the woes of the Commission in dealing with "spectrum grabs, nuisance greenmail applications and licensing backlogs." Nextel is plainly wrong about each. Its proposal would do nothing to solve the problems cited by Nextel and for which Nextel has failed to demonstrate even exist in the marketplace. However, assuming, *arguendo*, that such problems exist, other, less radical and damaging solutions exist which will not tax the Commission's resources beyond the breaking point and send the SMR industry into a tailspin.

Nextel's complaint regarding "spectrum grabs" is practically comical. Nextel, in its past efforts, has filed for authority to operate on up to 120 SMR channels from facilities to be located in counties with a population of less than 50,000 residents. In its definition of "spectrum grabs", Nextel has obviously failed to scrutinize its own tactics for assuring a wealth of spectrum for no purpose associated with the operation of facilities to serve the public.

Nextel's reference to "greenmail applications" must be interpreted as applications filed for the purpose of strike. If Nextel believes that such applications have been filed,

in violation of the Commission's Rules, the Commission's processes provide all relief necessary to Nextel to assure that such applications are either rejected by the Commission or that illegitimate authorizations are set aside. Nextel's sweeping pronouncement that all applications placed on file by persons other than ESMR operators must necessarily fall into this category is not supported by the record and Nextel's proposal to rid the Commission of a problem which is not demonstrated to exist by cognizable facts cannot serve as a rational basis for its proposed upheaval of the Commission's existing licensing plan.

Additionally, the Commission has created "finder's preference" rules to allow Nextel or other eligible persons to assure that only stations which are constructed and serving the public will continue to be authorized by the Commission. Nextel is, therefore, capable of protecting itself from abuse in the marketplace without any further assistance by the Commission.

As for "licensing backlogs" which exist within the Commission, the Commission has long possessed the capacity to erase much of its problem through simple exercise of its Rules and jurisdiction. The Commission need only apply the laws which exist which would limit the acceptance of any application, pleading or similar filing to those which are prepared either by the moving party or its legal counsel. By taking such steps, the Commission would eliminate the operations of "application mills" and the havoc they wreak on the Commission's resources. Nothing contained within Nextel's proposal

eliminates the problem. Nextel's self-serving suggestions merely shift the focus of these operations' activities.

### Nextel's Proposal Is Ill Timed

A matter of the enormity suggested by Nextel is entitled to a full airing by all affected parties. That this proposal is before the Commission at the eleventh hour within the context of a rule making whose comment period has fully run is reason enough to deny Nextel's proposal outright. The Commission is entitled and compelled to seek comments on this proposal from persons throughout the industry who may not have been made aware of its contents in time to prepare comments.

Madera fully recognizes the Commission's authority within rule makings to take a more expansive approach within the process. However, Nextel's suggestion is of such impact that the Commission cannot reasonably accept the suggestion without full comments from the industry, including a formal Commission proposal, initial comments, and reply comments. To act now would be to subject the industry to watershed changes without adequate notice. Accordingly, Nextel's suggestion must be deemed to invite the Commission's violation of the Administrative Procedures Act and legal precedent in the proper conduct of rule making proceedings.

The Commission should not place itself in any position where its actions would be subject to adverse appellate review, simply to appease a single, well-financed entity.



Instead, it should promote its tradition of thoughtful, deliberate action toward the improvement of services to the public and the industry, irrespective of Nextel's pleas for advantage and special treatment.

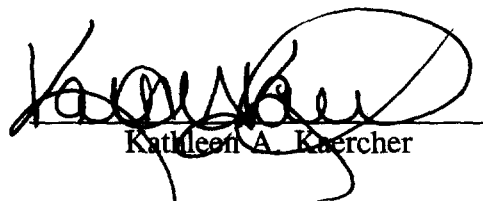
Nothing contained within Nextel's proposal and comments demonstrates that any emergency exists which demands that the Commission act in a rash manner. No safety of life or property is claimed to be at stake. There is, therefore, no compelling reason for the Commission to entertain Nextel's proposal at this time, and thereby, deprive the Commission of the advantage of a full set of comments which can only come after the general public has had the opportunity to give Nextel's suggestion the consideration it deserves.

Conclusion

As stated above, SMR operators and the Commission and subscribers to SMR service would be greatly harmed by grant of Nextel's proposal. Nothing contained within Nextel's comments warrants taking the proposed unusual and detrimental action by the Commission and the Commission should not be lured to its detriment to create a chaotic atmosphere in its licensing processes.

Respectfully submitted,  
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By

A handwritten signature in black ink, appearing to read 'Kathleen A. Kaercher', written over a horizontal line.

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Dated: July 11, 1994

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